Supreme Court, U.S.
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No.

UNITED STATES SUPREME COURT

OCTOBER, 1994 TERM

CELESTE ROGERS, WIFE OF/AND RONALD GLEN ROGERS
PETITIONERS

VERSUS

CORROSION PRODUCTS, INC.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PERRIN C. BUTLER

119 Metairie Lawn Drive

Metairie, Louisiana 70001

(504) 831-5958

Counsel of record for

Petitioners, Celeste Roger and

Glen Rogers

QUESTION PRESENTED FOR REVIEW

Do the tolling provisions of 11 U.S.C. sec. 108(c) suspend non-bankruptcy statutes of limitation so that the entire period of time that an automatic stay is in effect pursuant to 11 U.S.C. sec. 362 (a) is not counted towards the time in which a claim must be asserted against the debtor in a non-bankruptcy proceedings?

PARTIES TO THIS PROCEEDING

In conformity with Rule 14.1(b) of this Court, undersigned counsel certifies that all parties to this proceeding, both in this Court and in the Courts below, appear in the caption of this case.

TABLE OF CONTENTS

Question Presented for Review i

Parties to this proceeding ii

Table of contents ..... iii-iv

Table of Authorities ..... v-vi

Prior reports of this case vii

Statement of Jurisdiction ..... vii-ix

Relevant statutory authority ..... x-xi

Statement of the case

I. Course of the proceedings and disposition in the Courts below 1-5

II. Statement of the facts 5-10

Argument in support of Petition for Writ of Certiorari 11-24

Appendix

I. Decision of the United States Court of Appeals for the Fifth Circuit.....22-42

II. Judgment of the United States District Court for the Eastern District of Louisiana.....43-54

III. Ruling of Motion by the United States District Court for the Eastern District of Louisiana.....55

TABLE OF AUTHORITIES

Aslandis v. U.S. Lines, Inc., 7 F.3d 1067 (2nd Cir. 1993) 12, 15

Garbe Iron Works, Inc. v. Priester, 457 N.E. 2d 422 (Ill. 1983) 11, 15, 16-19, 22

In Re Cutty's - Guinee, Inc., 133 B.R. 929 (Bkrtcy - N.D. lll. 1991) ll

In Re Hunters Run, Ltd. Partnership, 875 F. 2d 1425 (9th Cir. 1989) 12, 16

In Re Morton, 866 F. 2d 561 (2d Cir. 1989) 12,
16

In Re Richards, 994 F. 2d 763 (10th Cir. 1993) 12, 16

In Re Roth, 171 B.R. 357 (Bkrtcy D.S.D. 1994) 22

Major Lumber Company v. G & B Remodeling, Inc., 817 S.W. 2d 474 (Mo. App. 1991) 11, 16, 19, 20, 22

Rogers v. Corrosion Products, Inc., 42 F. 3d 292 (5th Cir. 1995) vii, 5, 8, 13, 15, 20

11 U.S.C. Section 108(c)...i, x-xi, 4-7, 9-15, 20-21

11 U.S.C. Section 362...10

28 U.S.C. Section 1254...viii

28 U.S.C. Section 1332...1

La. C.C. Art. 3492...2-6

PRIOR REPORTS OF THIS CASE

This case has previously been reported, as **Rogers v. Corrosion Products, Inc.**, 42 F.3d 292 (5th Cir. 1995)[1]

[1] Opinion published January 12, 1995 by West Publishing Co., PP. 292-297.

STATEMENT OF JURISDICTION

In conformity with rule 14.1(e) of this Court Petitioners submit the following jurisdictional information:

(1) The opinion of the United States Court of Appeals for the Fifth Circuit in this matter was issued on January 12, 1995.

(2) No rehearing was requested in the United States Court of Appeals for the Fifth Circuit by any party.

(3) Celeste and Ronald Rogers base jurisdiction for this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on section 1254 of the Judicial Code, 28 U.S.C. sec. 1254 which provides for Certiorari to review any civil or criminal case in the Court

of Appeals, upon petition of any party, either before or after the Court of Appeals has rendered judgment.

RELEVANT STATUTORY AUTHORITY

The statute at issue in this Petition is in 11 U.S.C. section 108(c) which provides:

> "Except as provided in section 524 of this Title, if applicable non-bankruptcy law, an order entered in a non-bankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1301 of this Title, and such period has not expired before the date of the filing of the petition then such period does not expire until the later of -
>
> (1) the end of such period including any suspension of any period occurring on or after the commencement of the case; or

(2) thirty days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim."

STATEMENT OF THE CASE

I. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

This personal injury action was filed by Celeste Rogers wife of/and Ronald Glen Rogers **(the Rogers)** against Corrosion Products, Inc. **(CPI)** on March 23, 1993 in the United States District Court for the Eastern District of Louisiana. The Rogers based jurisdiction for their complaint on diversity of citizenship pursuant to 28 U.S.C. section 1332. They contend that Mr. Rogers, an employee of Chevron Oil Company **(Chevron)** was seriously injured at CPI's place of business in Belle Chasse, Louisiana on June 20, 1991. The Rogers claim that Mr. Rogers' injuries occurred when he was required to move pieces of heavy equipment (anodes) for inspection and photographing without help from CPI's

employees in derogation of prior agreement and custom between Mr. Rogers, Chevron and CPI.

On August 12, 1993 CPI answered the Rogers' Complaint. Thereafter, a preliminary pre-trial conference was held on September 24, 1993 at which time a March 28, 1994 Trial date was assigned.

On January 11, 1994 CPI filed a Motion for Summary Judgment contending that the Rogers' claim against it was time barred by Louisiana's one year prescriptive period for the bringing of tort (delictual) actions as provided in La. C.C. Art. 3492.

On January 31, 1994, the Rogers filed their opposition to CPI's motion for summary judgment asserting that La. C.C. Art. 3492's prescriptive period was suspended by CPI's

Chapter 7 bankruptcy proceeding which was commenced on February 10, 1992 and terminated on December 3, 1992.

Thereafter, both CPI and Rogers supplemented their memorandums filed with the district court. CPI also filed an unopposed motion and order to continue trial pending resolution of its motion for summary judgment and the completion of certain discovery matters.

On March 21, 1991, the district court ruled in favor of CPI on its motion for summary judgment finding that the Rogers' claim was time barred by La. C.C. Art. 3492. The district judge signed a judgment in accordance with his ruling on CPI's motion on March 21, 1994. The Rogers timely appealed to the United States Court of Appeals for the Fifth Circuit on April 12, 1994

and April 15, 1994.[2] On January 12, 1995, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court finding, inter alia, that the provisions of 11 U.S.C.. § 108 (c) did not suspend the running of La. C.C. Art. 3492's one-year prescriptive period for personal injury actions during the pendency of CPI's Chapter 7 bankruptcy proceedings. **Rogers v. Corrosion Products, Inc.,** 42 F. 3d 292 (5th Cir. 1995).

[2]The Rogers' first notice of appeal, filed April 12, 1994 mistakenly identified the date of entry of final judgment as March 1 rather than March 21, 1994. Out of an abundance of caution, the Rogers filed their second notice of appeal on April 15, 1994.

The Rogers elected not to request rehearing in the Court of Appeals but rather filed this petition for writ of certiorari in order to obtain a definitive interpretation of 11 U.S.C. § 108 (c).

II. STATEMENT OF THE FACTS

This petition for writ of certiorari results from the United States Court of Appeals for the Fifth Circuit's affirmance of the district court's dismissal of the Rogers' suit against CPI as a result of work-related injuries sustained by Mr. Rogers on June 20, 1991. The facts of the accident were not germane to the decisions of the courts below nor are they pertinant to this petition for writ of certiorari. Rather, the Rogers question the propriety of both the District Court and the Court of Appeals' interpretation of 11 U.S.C. § 108 (c) and those courts' conclusions

that this action was time barred pursuant to the one-year
statute of limitations for tort (delictual) actions provided by La. C.C. Art. 3492. They contend, contrary to the courts below, that CPI's Chapter 7 bankruptcy which was instituted on February 10, 1992 and dismissed on December 7, 1992 suspend the running of La. C.C. Art. 3492's prescriptive period during the entire pendency of the bankruptcy proceedings.

The relevant facts, for the purposes of interpretation of 11 U.S.C. § 108 (c) and consideration of CPI's motion for summary judgment are straightforward and agreed upon:

(1) Mr. Rogers was injured on June 20, 1991;

(2) The Rogers' diversity action was

filed on March 23, 1993;

(3) CPI's Chapter 7 bankruptcy proceedings were instituted on February 10, 1992;

(4) CPI's bankruptcy proceeding was dismissed on December 3, 1992 and notice of dismissal was given December 7, 1992;

(5) An automatic stay was in effect during the entire pendency of CPI's bankruptcy proceeding.[3]

Based upon the undisputed facts, 7 months and 21 days passed from the date of Mr. Rogers'

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[3]An additional recapitulation of the facts above is found in the Fifth Circuit Court of Appeals' opinion, **Rogers** at p. 293.

accident until the institution of CPI's bankruptcy proceeding. Three months and 21 days passed from the termination of that proceeding until the filing of the Rogers' diversity suit. Therefore, the **aggregate** passage of time from the date of Mr. Rogers' accident until commencement of these proceedings in the district court was less than one year if the time of the bankruptcy proceeding is **not included.**[4]

Nonetheless, both the district court and the United States Court of Appeals for the Fifth Circuit concluded that 11 U.S.C. § 108 (c) did **not suspend** the running of La. C.C. Art. 3492's prescriptive period during the pendency of CPI's

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[4]The total passage of time - not counting the bankruptcy proceeding - was 11 months and 12 days.

bankruptcy proceeding. Rather, both courts found that because the applicable statute of limitations ran during the pendency of CPI's bankruptcy proceeding, 11 U.S.C. § 108 (c) only **tolled** the prescriptive period for 30 days subsequent to notice of the termination/expiration of the automatic stay provided by 11 U.S.C. § 362. The Rogers contend that the intepretation by the courts below is incorrect and that the statute itself provides for a suspension of applicable non-bankruptcy statutes of limitations during the pendancy of bankruptcy proceedings.

The division of opinion in various federal and state courts concerning the appropriate interpretation of 11 U.S.C. § 108 (c) together with the importance of the resolution of this issue to the Rogers, other similarly situated creditors, and debtors, has engendered this Petition for

Writ of Certiorari.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The duration and effects of the "tolling"/ "suspension" provisions of § 108 (c) of the Bankruptcy Code have not been given uniform application. Some courts have explicitly held that non-bankruptcy statutes of limitation/duration are suspended for a period equivalent to the duration of the automatic stay issued pursuant to

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[5]e.g. **Major Lumber Company v. G. & Remodeling, Inc.,** 817 S.W. 2d 474 (Mo. App. 1991); **In re Cutty's - Guinee, Inc.,** 133 B.R. 929 (Bkrtcy. - N.D. Ill. 1991); **Garbe Iron Works, Inc. v. Priester,** 457 N.E. 2d 422 (Ill. 1983).

11 U.S.C. § 362 (a).[5] Other courts have implied/ left open this interpretation.[6]

Still other courts have limited the "tolling" provision of § 108 (c) to (1) the incorporation of periods of suspension found in non-bankruptcy statutes of limitations and (2) 30 days subsequent to notice of the termination or expiration of a stay issued pursuant to §§ 362, 922, 1201 or 1301 of the Bankruptcy Code.[7]

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[6] **In re Richards,** 994 F.2d 763, 765 (10th Cir. 1993); **In re Hunters Run, Ltd. Partnership,** 875 F.2d 1425 (9th Cir. 1989); **In re Morton,** 866 F.2d 561 (2d Cir. 1989).

[7] e.g. **Aslanidis v. U.S. Lines, Inc.,** 7 F.3d 1067 (2d Cir. 1993). Interestingly, **Aslanidis** and **In re Morton** were both decided by the Second Circuit Court of Appeals and arguably reached different results.

The United States Court of Appeals for the Fifth Circuit noted the divergence of opinions concerning the appropriate interpretation of § 108 (c). The question now becomes which is correct? Courts on both sides of the issue have stated that their interpretation is correct based on consideration of the statute with and without references to its legislative history.[9]

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[9]In **Garbe Iron Works, Inc.** the Illinois Supreme Court found that § 108 (c) suspended non-bankruptcy statutes of limitations for a period equivalent to the duration of the automatic stay based on both the plain wording of § 108 (c) (p. 424) and by reading it in pari materia with its legislative history (pp. 424-425). Conversely, the Second Circuit Court of Appeals reached the opposite conclusion in **Aslandis** again by reference to both the statute and its legislative history. (pp. 1072-1073). Interestingly, in the instant case the

The Rogers submit that the interpretation provided by **Major Lumber** and **Garbe Iron Works, Inc.** and in part by **In Re Richards**, **In Re Hunters Run, Ltd.**, and **In Re Morton**, is correct with respect to both statutory interpretation and policy. As the Illinois Supreme Court noted in **Garbe Iron Works, Inc.**:

United States Court of Appeals for the Fifth Circuit purported to base its decision "on the plain words of the statute" which it found to be unambiguous and allowing for only a 30-day grace period for filing claims subsequent to the end of a stay. As a result of the purported lack of ambiguity the Fifth Circuit found no need to address legislative history or policy arguments. **Rogers** at p. 297. However, one wonders how the Illinois Supreme Court and the United States Court of Appeals for the Fifth Circuit could interpret the "plain words" of the same statute and reach opposite conclusions in the absence of ambiguity.

"At issue is whether a bankruptcy filing by a necessary party in an action to enforce a mechanic's lien extends the amounts of time the subcontractor has to file suit. We conclude that it does and consider § 108 (c) of the Bankruptcy Act to be dispositive. It provides:

> '[I]f applicable law ... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor ... and such period has not expired before the date of the filing of the petition then such period does not expire until the later of - (1) the end of such period, including any sus-

> pension of such period occurring on or after the commencement of the cause; and (2) 30 days after notice of the termination or expiration of the stay under § 362, 922 or 1301 of this title ... '

11 U.S.C. § 108 (c) (Supp. 1979). Section (1) seems clearly applicable to the present case. To enforce its lien it was mandatory that plaintiff join both the contractor and the property owners (citation omitted). By virtue of the automatic stay, however, plaintiff was precluded for 133 days from proceeding against National Precast. According to § 108 (c) (1) plaintiff should have been allowed an additional 133 days to file suit after the three-year limitation period had expired on February 2, 1981. The filing of the Complaint on March 16, 1981, was therefore timely.

Defendants argue that § 108 (c) (1) should have no application here since it is only triggered when a particular statutory scheme provides for the suspension of a limitation period, and our statutes do not provide for suspension in these circumstances. The sole basis for their arguments is a legislative statement that § 108 (c) (1) includes any special suspensions of limitation. (11 U.S.C. § 108, Legislative Statements at 101 (1979).) Nowhere however do the legislative statements or the committee notes indicate that the application of § 108 (c) (1) is willing to do such situations, and to so hold would require a strained construction of that section and defeat its apparent purpose. The fact that the legislative statement indicates that § 108 (c) (1) 'includes' special statutory provisions suspending limitations otherwise applicable implies a broader purpose than attributed to it by defendants. While not entirely free from doubt, the intent of §§ 108 (c) (1) and (2) seems

> to be to extend the period within which a creditor may act by the greater of (1) the period granted by a particular statutory scheme, (2) the period during which action has been stayed by the Bankruptcy Act or (3) 30 days after notice of the termination of the stay."[10]

As the Missouri Court of Appeal noted in reviewing **Garbe Iron Works'** interpretation of § 108 (c) in **Major Lumber:**

> "This interpretation of § 108 (c) is consistent with existing case law from a majority of other jurisdictions. (Citations omitted). Furthermore, this interpretation is consistent with Congress' purpose in enacting § 108 (c) - to allow the debtor 'a breathing spell from its creditors'; Senate report No. 95-989, 95th Cong.

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[10]**Garbe Iron Works, Inc.** at pp. 424-425.

Sess. 30, U.S. Code Cong. & Admin. News 1978, 5787, 5816."[11]

At this juncture attention must be turned to a point raised by the district court in this case. In discussing the options available to the Rogers, based upon its interpretation of § 108 (c), the district judge noted that the Rogers could have moved to lift the automatic stay.[12] However, this approach is one of the reasons for adopting the interpretation of § 108 (c) advocated by the Rogers. In cases where the applicable non-bankruptcy statute of limitations will not run for a significant period (at the time that bankruptcy is filed) the prudent creditor is virtually required

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[11]**Major Lumber** at p. 478.

[12]**Rogers,** Civil Action No.93-0958 (Ed. La. 1994) at pp. 5-6.

to move to lift the automatic stay unless his state specifically provides for suspension of the statute of limitations during the pendency of the bankruptcy. Failure to do so would reduce the creditor's time to file suite to 30 days subsequent to the expiration of the stay. This is not a desirable result. Multiple requests to lift an automatic stay are at odds with its purpose - to provide a debtor with a breathing spell from his creditors.[13]

Further, an increase in requests to lift automatic stays might well result in an increase in their being lifted. This in turn would diminish the utility of the stay which has heretofore been a fundamental tenant of bankruptcy law.[14]

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[13]**Major Lumber** at p. 478.

[14]See **In re Roth,** 171 B.R. 357 (Bkrtcy. D.S.D. 1994) at p. 364.

Works' interpretation of § 108 (c) would promote uniformity in its application by allowing every creditor the unexpired portion of a non-bankruptcy statute of limitations within which to file a claim irrespective of reference to state laws concerning suspension. This would in turn reduce the potential for bankruptcy forum shopping and creditor uncertainty resulting in increased applications for lifting of automatic stays.

Accordingly, it is respectfully urged that this Petition for Writ of Certiorari be granted and either (a) the decision of the United States Court of Appeals for the Fifth Circuit and the district court be reversed and this matter re-

manded for further proceedings in the Eastern District of Louisiana or; (b) this case be docketed for hearing before this Court.

Respectfully submitted,

_____

PERRIN C. BUTLER
BUTLER & STERN
119 Metairie, LA 70001
(504) 831-5958
Attorneys for Appellants,
Celeste Rogers and
Ronald Glen Rogers

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U.S. Court of Appeals
Fifth Circuit

Celeste ROGERS and Ronald Glen Rogers, Plaintiffs-Appellants

v.

CORROSION PRODUCTS, INC., Defendant-Appellee.

No. 94-30229.

United States Court of Appeals, Fifth Circuit

Jan. 12, 1995

Before HIGGINBOTHAM, SMITH, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Ronald Rogers ("Rogers") appeals the district court's dismissal of his diversity-based delictual action against Corrosion Products, Inc. ("CPI"), on statute of limitations grounds. He argues that the prescriptive period was suspended, either under Louisiana law or the Bankruptcy Code, when CPI was placed involuntarily

into chapter VII bankruptcy. Concluding that this event did not stop the running of the prescriptive period, we affirm.

I.

Rogers, a worker for Chevron, allegedly was injured when working at a CPI facility in Belle Chasse, Louisiana, on June 20, 1991. On March 23, 1993, Rogers, basing his suit upon diversity of citizenship, filed a Louisiana delictual action in federal court.

Under Louisiana law, however, the period for bringing delictual actions is one year. LA. Civ. Code Ann. art. 3492 (West 1994). Accordingly, CPI asserted the affirmative defense of liberative prescription and moved for summary judgment. Rogers opposed the motion, arguing that bankruptcy proceedings had suspended the running of the prescriptive period.

On February 10, 1992, bankruptcy proceedings had been instigated against CPI by the filing of a petition for involuntary relief by

several of CPI's creditors. An automatic stay was put into effect until the petition was dismissed on December 3, 1992.

Notice of the dismissal was issued on December 7, 1992. Because Rogers could not bring suit during the period of the stay, he argued that this period should not be counted in determining the prescriptive period. The district court disagreed, however, and held that Rogers was time barred.

II.

[1] Rogers argues that the running of the prescriptive period was suspended by either Louisiana law or the Bankruptcy Code. The questions presented are purely matters of law that we review *de nova*. *FDIC v. Dawson*, 4 F.3d 1303, 1308 (5th Cir. 1993) *cert., denied*, ____U.S. ____, 114 S.Ct. 2673, 129 L.Ed.2d 809 (1994).

A.

[2] The one-year prescriptive period of art. 3492 may be increased either by interrup-

tion, which restarts the prescriptive period, or by suspension, which only stops it for the applicable time. *Compare* La.Civ.Code Ann.art. 3466 (effect of this interruption) *with* La.Civ.Code Ann. art. 3477 (effect of suspension). On the face of the Louisiana Civil Code, the exceptions that allow an extension of the prescriptive period are limited to those legislatively created. *See* La.Civ.Code Ann. art. 3467 ("Prescription runs against all persons unless exception is established by legislation").[1]

Louisiana law, however, has long recognized a judicial doctrine, *contra non valentem agere non currit praescripto*, [2] which suspends the running of the prescriptive period for a limited category of claimants who are unable to

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[1]Rogers concedes that there is no applicable, legislatively imposed suspension exception for bankruptcy proceedings.

[2]"No prescription runs against a person unable to bring an action." Black's Law Dictionary 327 (6th ed. 1990)

bring suit. This doctrine continues to be recognized as an implied doctrine of article 3467. *See* La.Civ.Code Ann. art. 3467 revision cmts.-1982 (d) (stating that the jurisprudence of *contra non valentem* continues to be relevant); *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1055 (La. 1987).

[3] Under Louisiana law, the *contra non valentem* doctrine has been parsed into four distinct categories. The doctrine may suspend the running of the prescriptive period where (1) there was some legal cause that prevented the courts of their officers from taking cognizance of or acting on the plaintiff's action (2) there was some condition coupled with the contract or connected with the proceedings that prevented the creditor from suing or acting; (3) the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; or (4) the cause of action is not known or

reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. .*Whitnell v. Menville*, 540 So.2d 304, 308 (La.1989); *Plaquemines Parish*, 502 So.2d at 1054-55; *Corsey v. State Dep't of Corrections*, 375 So.2d 1319, 1321-22 (La.1979).

[4] At issue here are exceptions two and three[3] Rogers argues that the bankruptcy proceeding is either "connected to the proceedings" so that Rogers could not sue, or CPI availed itself of the bankruptcy "safe harbor" and should not now be able to use it as a bar to Roger's suit. Rogers believes that the limited case law in this area is due positive on the prescription issue.

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[3]The district court interpreted exception one and applying only to situations of physical impossibility. *See National Fire Union Ins. Co. v. Ward*, 612 So.2d 964, 968 (La.App.2d Cir. 1993) ("A 'legal cause' in this context appears to refer to a situation such as the courts being closed because of wartime conditions..."). Rogers says that exception one arguably applies, but he fails for brief this issue.

Rogers cites two case that moderately support his position on exception two. Both cases, however, discuss the issue only in *dicta*. In *Cole v. Celotex Corp.*, 611 So.2d 153, 157-58 (La.App. 3d Cir. 1992), *rev'd*, 620 So.2d 1154 (La.1993), the delictual plaintiff proceeded against a number of defendants, including Johns-Manville. The trial court, however, dismissed the action against the other defendants on prescription grounds. On appeal, the plaintiff argued that if the defendants were solitarily liable, suspension of the prescriptive period for one would apply to all of them. The prescriptive period was suspended for one, he argued, because defendant Johns-Mansville filed for bankruptcy during the pendency of the suit, an act that the court assumed "Clearly precluded [the plaintiff] from proceeding against Johns-Manville." *Id. at* 157. Nevertheless the assumption was not essential to the conclusion, as the court found that only interruption, rather than suspension, would apply to all solidary obligors. *Id.* at 158.

In *Cockerham v. Armstrong World Indus.*,717 F.Supp. 433 (M.D.La.1989), a court faced the same issue as in *Cole* (as well as one of the same defendants). Again, the court assumed that under Louisiana law, bankruptcy proceedings would suspend, but not interrupt, the prescription period. *See id.* at 434 ("[Bankruptcy proceeding] may well amount to a suspension of prescription as to Johns-Mansville under Article 3472 of the Louisiana Civil Code."). This assumption was not necessary to support the holding.

Other courts in Louisiana that have directly addressed this issue have reached a contrary result. In *Christen v. Al Copeland Enters.*, 635 So.2d 596, 598 (La.App. 3d Cir. 1994), the court, with little discussion, disavowed the *Cole dictum*, stating that the "[p]laintiff's claim for suspension of prescription because of the bankruptcy automatic stay is without merit." *See also Lee v. Champion Ins. Co.*, 591 So.2d 1364, 1366

(La.App. 4th Cir. 1991) (holding that "liquidation" does not bar filing of suit or suspend the prescriptive period).

[5-8] In diversity cases, we apply substantive state law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Louisiana's highest court, however, has not decided whether *contra non valentem* applies to proceedings stayed by bankruptcy filings. Therefore, we must make an *"Erie* guess" on how the court would *rule*. *See Labiche v. Legal Sec. Ins. Co.*, 31 F.3d 350, 352 (5th Cir. 1994); *Transcontinental Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992) ("When there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide.") (footnote omitted). The decisions of lower state courts should be given some weight, but they are not controlling where the highest state court has not spoken on the subject. *Commissioner v. Estate of Borsch*,

387 U.S. 456, 465, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967). "'[A]n intermediate appellate state court ... is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive date that the highest court of the state would decide otherwise.'" *Id.* (ellipsis in original citation and emphasis omitted).

Here, on exception two of the doctrine of *contra non valentem*, we are faced with the holdings of two different Louisiana appellate courts that, albeit with sparse reasoning, refuse to apply *contra non valentem* to bankruptcy stays. The contrary authority is found only in *dicta*. Therefore, the jurisprudence here counsels us not to broaden suspension to include bankruptcy proceedings.

Moreover, as Louisiana's highest court has often noted, *see, e.g., Plaquemines*, 502 So.2d at 1057, the basic principle of the doctrine is equity. Rogers has failed to show how CPI has

acted unfairly or taken advantage of him. CPI did not affirmatively seek to avoid suit by filing for protection under the Bankruptcy Code; rather, CPI was forced into bankruptcy when several of its creditors filed a petition for involuntary bankruptcy.

Rogers, on the other hand, failed to pursue his suit. Like any other creditor of a debtor, he could have petitioned the court to lift its stay. *See* 11 U.S.C. § 362(d) (allowing a party in interest to petition the bankruptcy court to terminate, annul, modify, or condition a stay upon a showing "for cause"). If the bankruptcy court does not respond to the petition within [the prescribed period], the stay is automatically "terminated with respect to the party making the request...." *Id* § 362(e). Finally, under *id.* § 362(e). Finally, under *id.*§ 108(c)(2), a party's right to sue is preserved for thirty days after the termination of the stay, regardless of the prescription period. Even without petitioning the

bankruptcy court to lift the stay, Rogers could have filed suit within thirty days of the dissolution of the stay. Instead, he "slept on his rights."

[9] Rogers does not cite any authority on the issue of exception three, which provides relief for plaintiffs who have been prevented from filing because of the actions of the other party. *See Plaquemines Parish,* 502 So.2d at 1056. Like exception two, this exception is based generally upon equitable principles and is applied in situations involving "concealment, fraud, misrepresentation or other ill practices." *Id.* Because there was no inequitable action on the part of CPI, we find this exception does not apply. In sum, we hold that *contra non valentem* does not suspend the running of the prescriptive period because of the imposition of an automatic stay under the Bankruptcy code.

B.

[10] If Louisiana law does not suspend prescription, the next step is to examine the

Bankruptcy Code to determine whether it provides a separate basis for suspension. The "Extension of Time" provision of the Code provides:

> [I]f applicable nonbankruptcy law... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor ... and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of–
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay under section 362 ...of this title ....

11 U.S.C. § 108(c). Both parties agree this is the only pertinent section of the Code. They differ in interpretation, however, with CPI finding no separate federal basis for tolling

state prescriptive periods and Rogers arguing that § 108(c) itself tolls the prescriptive period.

We are not the first circuit to face this issue. Panels of both the Second and Ninth Circuits have examined the language and legislative history of this section of the Code. Unfortunately, they have created a potential split in result. Other federal courts have divided likewise.

The most current Second Circuit opinion, reading the plain words of the statute,[4]

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[4]While the Second Circuit's reading§ 108(c) in *Aslanidis* could have been based solely upon the plain language of the statute, the court nonetheless also examined the legislative history and found that it supported its interpretation. It found that § 108(c)(1) only referred to "special suspensions" that are found in other non-bankruptcy statutes. *Id.* at 1073; *see* 2 Lawrence P. King, Collier on Bankrputcy ¶ 19=08.04 (15th e.d 1993); H.R.Rep. No. 595, 95th Cong., 1st Sess. 318, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6275.

interpreted it to "merely [to] incorporate[] suspensions of deadlines that are expressly provided in *other* federal or state statutes." *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993). The section did not provide a separate ground to toll statutes of limitations. *Id.* Instead, it only extended time for filing suit for 30 days "after notice of termination of a bankruptcy stay, if any such deadline would have fallen on an earlier date." *Id.; see also West v. United States (In re West)*, 5 F.3d 423, 425-27 (9th Cir. 1993) (holding that suspension was required by section of Internal Revenue Code incorporated by § 108(c)), *cert. denied*,—U.S. —, 114 S.Ct. 1830, 128 L.Ed.2d 459 (1994).

The court in *Aslanidis was* forced contend with an earlier Second Circuit decision *Morton v. National Bank of New York City (In*

re Morton), 866F.2d 561 (2d Cir. 1989), which had held that "11 U.S.C. § 108(c) tolls the [state] ten-year period limiting judgment liens on real property until the automatic stay is terminated." *Id.* at 562. In *Morton*, a bank that had a lien on the debtor's property faced the end of the state ten-year period in which it has to extend or enforce its lien. The debtor, who was in bankruptcy and thus had stayed all judgments against him, argued that the lien had expired, because the bank was foreclosed from renewing its lien.

The court examined the purpose of § 108(c) and the thirty-day provision of § 108(c)(2) and held that the lien had not expired. What the court did not decide explicitly was whether the ten-year period was actually suspended (as the language of the opinion suggests), or whether, instead, the bank merely had thirty days after the lifting of the stay to act (as the language of the section

suggests).

Accordingly, when the Second Circuit again addressed this issue in *Aslanidis*, that panel distinguished *Morton* by finding that it only addressed what happened during the period of the stay (the lien was preserved)[5], and the Code allowed a thirty-day savings period even if the limiting time had expired 7 F.3d at 1074.

The Ninth Circuit, citing *Morton*, wrote a equally opaque decision in *Miner Corp. v.*

[5]A reading of the cases cited in *Morton* to support its position on tolling reveals that they stand for the more general proposition that § 108(c) applies to the time limits of lien enforcement (statutes of duration) as well as the more generally applicable time limits of statutes of limitation. *See Victoria Grain Co. v. Janesville Elevator Constr., Inc. (In re Victoria Grain Co.)*, 45 B.R. (Bankr.D.Minn. 1984);*Meek Lumber Yard, Inc. Houts (In re Houts)*, 23 B.R.705 (Bankr. W.D.M. 1982); *First Am.Title Co. v. Design Builders, Inc. (In re Design Builders, Inc.)* 18 B.R. (Bankr. D.Idaho 1981).

Hunters Run Ltd. Partnership), 875 F.2d 1425, 1429 (9th Cir. 1989). Again, the general question was whether § 108(c) applied to the time limits to enforcement actions of liens.

The court held that it did and that the time period was "tolled." *Id.* The court did not time period was "tolling" meant that the time period ceased to run, or simply that a thirty-day grace period existed under the statute if the time period had run.

Some other courts have reached the same result as did the Second Court.[6] Other courts, perhaps misled by the ambiguity of

[6]*See Mamer v. Apex R.E. & T.*, 852 F.Supp. 870, 872 (E.D.Mo. 1994) (adopting reasoning of *Aslanidis); Farm Crecit Bank v. Vallee*, 148 B.R. 1021, 1023 (W.D.La. 1992) ("Federal law *extends* a prescriptive period 30 days after filing of an order terminating bankruptcy."); *Pettibone Corp. v. Baker (In re Pettibone Corp.)*, 110 B.R. 848, 853 (Bnkr. N.D. Ill. 1990) (holdig that unless applicable federal or state law suspending running of limitations, only a 30-day "short filing period" exists extending cliam), *aff'd*, 119 B.R. 603 (N.D.Ill.

some of the prior decisions, have held that the total period of the stay is added to the time allowed to file suit.[7]

1990), *vacated*, 935 F.2d 120 (7th Cir. 1991); *In re Coan*, 96 B.R. 828, 831-33 (Bankr. N.D.Ill. 1989)(holding that § 108(c) extends period for thirty days); *Steinberg v. National Survey Serv., Inc. (In re Chemisphere Partners)*, 90 B.R. 380, 381-82 (Bankr.N.D.Ill. 1988)(holding that state law incorporated by § 108(c) tolled the statute of limitations); *Grotting v. Hudson Shipbuilders*, 85 B.R. 568, 569-70 (W.D.Wash. 1988) (finding that plain language, legislative history, and limited reading of statute "comports best with expeditious and fair administration of bankrupt's estate"); *Wilkey v. Union Bank & Trust Co. (In re Baird)*, 63 B.R. 60, 62-63 (Bankr. W.D.Ky. 1986)(reading plain language and legislative history to find statute *extends (not suspends)* time to file for 30 days after end of stay), *of. Pettibone v. Easley*, 935 F.2d 120, 121 (7th Cir. 1991)("Plaintiffs who had filed during the bankruptcy had 30 days after the termination of the stay to re-file their cases with assurance that they could not be deemed untimely.")

[7]Rogers, for example, cites, *Major Lumber Co. v. G & B Remodel-*

We base our decision on the plain words of the statute and find that § 108(c) does not create a separate tolling provision. *See West Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98, 111 S.Ct. 1138, 1146-47, 113 L.Ed.2d 68 (1991) (holding that legislative history is ir-

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ing, Inc. 8217 S.W.2d 474, 477-78 (Mo.Ct.App.1991), which holds "that § 108(c) is not restricted to tolling only those state statutes have special suspension provisions." Accordingly, the court, in applying § 108(c), did not count the time of the stay in the limitations period, even though state law did not require that result. *Major Lumber*cites several other state court decisions that it believes do liekwise. *See, e.g., Garbe Iron Works, Inc. v. Priester*, 99Ill.2d 84, 75 Ill.Dec. 428, 457 N.E.2d 422, 424-25 (1983); *Wells v. California Tomato Juice, Inc.*, 47 Cal.App. 2d 634, 118 P.2d 916, 918-19 (1941). As noted above, some federal cases such as *Morton*and *Hunters Run* could be read to hold the same. *See also In re Richards*, 944 F.2d 763, 765 (10th Cir. 1993) ("For Exmaple, 11 U.S.C. § 108 suspends the statute of limitations for actions outside of bankruptcy for pendency of the current bankruptcy provisions.") (dictum).

relevant for interpreting statutes whose text is unambiguous). The statute plainly states that for the time period to be suspended, other federal or state law must mandate it and then be incorporated through § 108(c). Otherwise, a party must file suit within the thirty-day grace period after the end of the stay. We need not and do not reach the legislative history and policy arguments.

Our conclusion is not contrary to that of the Ninth Circuit. Its decisions simply use the word "tolling" to mean "extend." Section 108(c) extends the period in which a party must file suit in order to preserve the claim for whatever period the stay is in force plus thirty days. Because a party may not file suit during the duration of the stay, the thirty-day period becomes the only functional period in which to commence suit. We reject cases such as *Major Lumber*, which hold to the contrary.

For that reasons discussed above, the judgment of the district court is AFFIRMED.

FILED
March 21, 1994
U.S. Dist. Court
Eastern District

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CELESTE ROGERS, ET AL	)	CIVIL ACTION
	)	
versus	)	NO. 93-0958
	)	
CORROSION PRODUCTS, INC.)		SECTION:E/2

RULING ON MOTION

Defendant, Corrosion Products, Inc. ("CPI"), moves for summary judgment, seeking dismissal of this action on the basis that plaintiffs' claims have prescribed under Louisiana law. Plaintiffs, Celeste Rogers and her spouse Ronald Glen Rogers, oppose the motion.

I. Factual Background

Plaintiff Ronald Glen Rogers alleges that, on June 20, 1991, while he was an employee of Chevron Oil Company, he injured his spine when he, single-handedly, moved heavy equipment on the premises of Corrosion Products, Inc., in Belle Chasse, Louisiana.

He seeks damages for the medical expenses and disability that he claims resulted from the injuries sustained. Celeste Rogers, his wife, seeks damages for loss of consortium.

Plaintiffs are Texas residents, while defendant is a Louisiana corporation with its principal place of business in Louisiana. Jurisdiction, therefore, is based on diversity, pursuant to 28 U.S.C. § 1332.

Plaintiffs filed suit against CPI on March 23, 1993. They contend that a pre-existing, involuntary Chapter 7 period in bankruptcy filed against CPI prevented them from filing this action earlier, and served to interrupt/suspend the applicable prescriptive period.

The relevant dates, as conceded by both parties, are as follows:

Date of Ronald Rogers' alleged injury:	June 20, 1991
Bankruptcy petition filed:	February 10, 1992
Bankruptcy petition dismissed:	December 3, 1992
Notice of dismissal issued:	December 7, 1992
Plaintiffs' suit filed:	March 23, 1993

II. Analysis

Summary judgment is appropriate only when there is no genuine issue as to any material fact. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247 (1986). The litigant who moves for summary judgment has to show the absence of genuine factual issues. See Celotex Corp. v. Catreett, 477 U.S. 317, 323 (1986). Once that is done, the non-moving party must set forth "specific facts showing there is a genuine issue for trial." Fed. R.Civ. P. 56(e). Any inference that may be drawn from the underlying facts are viewed "in the light most favorable" to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Consequently, this Court may grant defendant's motion for summary judgment only if the Court finds that sufficient, undisputed factual ingredients exist that establish, as a matter of law, that the relevant statute of limitations barred plaintiffs from filing this action.

A. **What is the appropriate statute of limitation?**

Plaintiffs half-heartedly argue for the use of the statute of limitations mandated by Texas law. Texas

has a two year prescriptive period for tort actions. If Texas law governs, there is no problem; this suit becomes timely because it was filed within 2 years of the accrual of the cause of action. Then, this Court need not rule on the effect the bankruptcy action had on the period of prescription. Matters, however, are not so simple.

Jurisdiction is this case is based on diversity. In diversity actions, "Louisiana courts customarily apply the law of the forum to the issue of limitations." Crase v. Astroworld, Inc., 941 F.2d 265, 266 (5th Cir. 1991). Such custom comports with the recognition that statutes of limitations are procedural rules. Id. at 266-67. Hence, this Court finds that Louisiana's one-year prescriptive period applies in this case.[1] Since this suit

[1]The result is the same even if the Court were to conduct an "interest analysis" to determine which law should govern the statute of limitations in this action. The alleged injury occurred in Louisiana while the plaintiff, Ronald Rogers, was working in Louisiana. The defendant is domiciled in Louisiana and has its principal place of business in Louisiana. The only connection that Texas has with the case is that plaintiffs are residents of Texas. Therefore, because Louisiana has a greater interest in the action, Louisiana law should apply.

was not initiated within one year after the cause of action arose, this action is barred unless the Court finds that the bankruptcy proceeding interrupted/ suspended the prescriptive period.

B. Effect of bankruptcy petition

Plaintiffs contend that even if the Louisiana prescriptive period applies to this action, the bankruptcy petition filed on February 10, 1992, acted to suspend prescription.[2] At the time the bankruptcy petition was filed, plaintiffs still had over four months in which to file suit. That four-month period, they claim, was

[2]11 U.S.C. § 312 provides for an automatic stay of any proceeding against a debtor who is in bankruptcy. That section, however, allows a claimant to move the Bankruptcy Court to lift the stay. See 11 U.S.C. § 312(d)-(f).

Further, 11 U.S.C. § 108(c) reads:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbanruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1301 of this tile, and such period has not expired

available to them when the bankruptcy petition was dismissed on December 3, 1992. Hence, they argue, according to Louisiana law,[3] the suit filed by them on March 24, 1993, was within the one year period of limitations applicable to tort actions.

Defendant, on the other hand, argues that the relevant statute of limitations period was not suspended during the automatic stay imposed by the bankruptcy action. Consequently, they assert that

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> before the date of the filing of the petition, then such period does not expire until the later of -
>
> (1) the end of such period, <u>including any suspension of such period occurring on or after the commencement of the case;</u> or
>
> (2) 30 days after notice of the termination of expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

(Emphasis added).

[3] La. Civ. Code art. 3472 states:

"The period of suspension si not counted toward a prescription. Prescription commences to run again upon the termination of the period of suspension."

because plaintiffs did not file their personal injury claims within one year, as required by Louisiana law, and because plaintiffs did not file their suit within the alternative 30-day period following the lifting of the stay in bankruptcy, as envisaged by 11 U.S.C. § 108(c), plaintiffs are barred from proceeding against defendant.

Neither party has cited Fifth Circuit decisions addressing this issue of whether the relevant period of prescription is suspended during the automatic stay in bankruptcy.

The plain language of 11 U.S.C. § 108(c) does not call for the suspension of a statute of limitations in every case. See Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1073 (2nd Cir. 1993). The language in the section that alludes to "any suspension" of a prescription period "merely incorporates suspension of deadlines that are expressly provided for in other federal or state statutes." Id. (pointing out that "special suspensions"

in non-bankruptcy law, such as those in provisions of the Internal Revenue Code, are given effect by 11 U.S.C. § 108(c)). See Grotting v. Hudson Shipbuilders, Inc., 85 B.R. 568 (W.D. Wash. 1988) (holding that 11 U.S.C. 108(c) accedes to express state law statutory provisions that permit tolling of prescription because of minority or incompetence of a plaintiff). See also Harris v. Pettibone Corp., 142 B.R. 763, 764-65 (M.D. La. 1992) (assuming, generally, that under 11 U.S.C. § 108(c) plaintiffs whose claims have not prescribed when a bankruptcy petition is filed and whose prescription periods have expired during the life of the automatic stay, have 30 days from the time the automatic stay is lifted to bring their tort suits).

Tort claimants, faced with § 108(c), are given several choices: (1) they may move the Bankruptcy Court to lift the stay: (2) they may file after the bankruptcy action terminates, if the relevant prescription period still has time to run; or (3) they may file during the 30-day period following the lifting of the stay or

termination of the bankruptcy proceeding. Grotting v. Hudson Shipbuilders, Inc., 85 B.R. 568 (W.D. Wash. 1988). It is reasonable to hold them to exercise one of the option given. Moreover, in the instant case, plaintiffs admit that they had notice or dismissal of bankruptcy. Therefore, they could have brought suit within the 30-day period following dismissal of the bankruptcy proceeding.[4]

Furthermore, statutes of limitations "are designed to ensure fairness to defendants and to prevent surprises brought about by so long that proof, witnesses and memories all, have disappeared." Aslanidis, 7 F.2d at 1074. In the bankruptcy arena, because of the length and complexity of most proceedings, it is even more important for parties to have certain knowledge of when claims will expire. See Grotting, 85 B.R. at 570.

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[4]If, as plaintiffs claim, 11 U.S.C. 108(c) automatically suspends the running of any applicable statute of limitations, the 30 day window afforded by congress to plaintiffs in that same section would be of use only in very limited circumstances; in which to bring their claims, before the bankruptcy stay goes into effect.

Consequently, unless there is an independent basis, under Louisiana law, that allows for the suspension of the normal one-year prescription period for tort actions, 11 U.S.C. § 108(c), by itself, does not confer any such blanket right. But see Major Lumber v. G & B Remodeling, Inc., 817 S.W. 2d 474 (Mo Ct. App. 1991)(holding that the application of § 108(c) is not limited to tolling only those state statutes that have special suspension provisions).

C. **Effect of Louisiana law**

Louisiana law clearly states that "prescription runs against all persons unless exception is established by legislation." La. Civ. Code Ann. art 3467. Plaintiffs have not cited to any legislation that provides for an exception to prescription that would apply to their action. They, however, make a feeble argument for the applicable of the doctrine of contra **non valentem non currit praescriptio.**

The doctrine of **contra non valentem,** they argue, applies to suspend prescription, in their case, because

"there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action." Corsey v. State Department of Corrections, 375 So.2d 1319 (La. 1979). They state that the automatic stay provisions of the Federal Bankruptcy Code constitute a "legal cause", one that necessitates suspension of the prescription period.

The "legal cause" category is rarely used to suspend prescription. Whitnell v. Menville, 540 So. 2d 304, 308 (La. 1989). "Legal cause" refers to "a situation such as the courts being closed by wartime conditions." National Union Fire Insurance v. Ward, 612 So.2d 964, 966 (La. Ct. App. 1993). As this case does not involve any such "legal cause," plaintiffs' argument must be rejected.

Since there are sufficient, undisputed factual ingredients that establish, as matter of law, that the applicable Louisiana statute of limitations bars this action, summary judgment is appropriate in favor of defendant.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of Corrosion Products, Inc. for summary judgment dismissing plaintiffs' claims as prescribed (Rec Doc 5) be and is hereby **GRANTED.**

New Orleans, Louisiana, March 21, 1994.

/s/ Marcel Livaudais, Jr. /s/

MARCEL LIVAUDAIS, JR.

UNITED STATES

DISTRICT JUDGE

FILED
March 21, 1994
Eastern District

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CELESTE ROGERS, ET AL

versus

CORROSION PRODUCTS, INC.

JUDGMENT

Considering the record, this Court's Ruling on Motion entered this date, and the law, for the reasons assigned,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant Corrosion Products, Inc., and against plaintiffs, Celeste Rogers and Ronald Rogers, **DISMISSING** plaintiffs' complaint with costs.

New Orleans, Louisiana, March 21, 1994.

/s/ Marcel Livaudais, Jr. /s/

MARCEL LIVAUDAIS, JR.

UNITED STATES

DISTRICT JUDGE